UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SAFETY & ECOLOGY CORPORATION,

Petitioner,

v.

U.S. DEPARTMENT OF ENERGY, SPENCER ABRAHAM, in his official capacity as Secretary of Energy, U.S. Department of Energy, and SUE GOSSETT

Respondents.

Civil Action No. 03-0747 (JDB)

MEMORANDUM OPINION

Petitioner Safety & Ecology Corporation ("SECC") seeks judicial review of a final agency action under 5 U.S.C. § 702 of the Administrative Procedures Act ("APA"). The final agency decision, issued by the Office of Hearing and Appeals ("OHA") of the Department of Energy ("DOE"), found that SECC terminated Susan Rice Gossett ("Gossett") in retaliation for protected safety disclosures made pursuant to 10 C.F.R § 708 et seq. SECC argues that the OHA decision should be reversed because it violates statutory provisions, is arbitrary and capricious, constitutes an unwarranted exercise of discretion, is not supported by substantial evidence, and is otherwise contrary to law. Presently before this Court are cross motions for summary judgment from SECC and from respondents, DOE and Gossett. For the reasons that follow, the Court will deny petitioner's motion for summary judgment and grant respondents' motions.

BACKGROUND

A. Department of Labor Regulations

DOE's Contractor Employee Protection Program (a.k.a. "Whistleblower Program") created procedures for the investigation, hearing, and review of allegations of reprisal against DOE contractor employees. See 57 Fed. Reg. 7533 (March 3, 1992). The regulations governing the Whistleblower Program are set forth in 10 C.F.R. § 708 et seq., and apply to employees of a company that has a contract with DOE and performs work directly related to activities at a DOE-owned or leased site. See 10 C.F.R. § 708.2. An employee may file a complaint alleging retaliation as a result of:

> (a) Disclosing to a DOE official, a member of Congress, any other government official who has responsibility for the oversight of the conduct of operations at the DOE site, [the] employer, or any higher tier contractor, information that [the employee] reasonably believes reveals --
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> (1) A substantial violation of a law, rule or regulation;
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> (2) A substantial and specific danger to employees or to public health or safety; or
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> (3) Fraud, gross mismanagement, gross waste of funds, or abuse of authority; or
>
> (b) Participating in a Congressional proceeding or an administrative proceeding conducted under this part; or
>
> (c) Subject to § 708.7 of this subpart, refusing to participate in an activity, policy, or practice if [the employee] believe[s] participation would --
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> (1) Constitute a violation of federal health or safety law; or
>
> (2) Cause you to have a reasonable fear of serious injury to [the employee], other employees, or members of the public.

10 C.F.R. § 708.5 (collectively referred to as "protected disclosures").

If an employee believes he or she is a victim of retaliation, the employee must file a complaint. See 10 C.F.R. § 708.10. After filing a complaint, the employee then pursues the matter through an informal resolution mechanism. See 10 C.F.R. § 708.11-.20. If the matter cannot be resolved informally, the employee may request that the matter be referred to DOE's

Office of Hearing and Appeals ("OHA") for either a hearing, or a hearing preceded by an investigation. See 10 C.F.R. § 708.21(a). In the case of an investigation, OHA appoints an investigator who issues a Report of Investigation ("ROI"). See 10 C.F.R. § 708.22-23.

After the ROI is issued, a hearing is conducted by a Hearing Officer appointed by OHA. See 10 C.F.R. § 708.24. In a section 708 hearing, the parties have the right to be represented by counsel, testimony is given under oath, there is cross-examination of witnesses, the formal rules of evidence do not apply strictly but serve as guidelines, and the proceedings are transcribed by a court reporter. See 10 C.F.R. § 708.28(a). The Hearing Officer also has the power to allow discovery, issue subpoenas, rule on evidentiary objections, dismiss claims, and accept briefings. See 10 C.F.R. § 708.28(b).

In a provision central to this case, the regulations specify what the parties to the proceedings must prove:

> The employee who files a complaint has the burden of establishing by a preponderance of the evidence that he or she made a disclosure, participated in a proceeding, or refused to participate, as described under § 708.5, and that such act was a contributing factor in one or more alleged acts of retaliation against the employee by the contractor. Once the employee has met this burden, the burden shifts to the contractor to prove by clear and convincing evidence that it would have taken the same action without the employee's disclosure, participation, or refusal.

10 C.F.R. § 708.29.

After the hearing, the Hearing Officer issues an Initial Agency Decision ("IAD"), which determines findings of facts, conclusions, an order and, if a finding of retaliation is made, the appropriate relief. See 10 C.F.R. § 708.30. A dissatisfied party can appeal the Hearing Officer's IAD to the OHA Director. See 10 C.F.R. § 708.32. The OHA Director will issue a decision

based upon the record that includes findings of fact, conclusions, and an order. See 10 C.F.R. § 708.34(b)(1). The decision of the OHA Director constitutes the final agency decision, unless a party seeks Secretarial review. See 10 C.F.R. § 708.34(d).

B. Factual Background[1]

SECC is an environmental, safety, and health company that provides various support services, to include radiological control, remediation and demolition, to governmental and private business entities. Petitioner's Statement of Undisputed Material Facts ("Pet.'s Statement") ¶ 1. SECC, through a contract with Bechtel Jacobs Company, LLC, provides radiological control services for the DOE facility in Portsmouth, Ohio. Id. ¶ 2.

SECC hired Gossett as a junior radiation control technician ("RCT") at DOE's Portsmouth site in March of 1999. Id. ¶ 3. An RCT monitors radiation contamination levels at DOE sites in order to protect the workforce and the environment from exposure to ionizing radiation. Pet.'s Statement ¶ 4. Subsequently, SECC promoted Gossett to the position of senior RCT in June of 2000. Respondent DOE's Statement of Material Facts Not in Dispute ("Resp. DOE's Statement") ¶ 1.

While Gossett was employed at SECC's Portsmouth site, she made numerous protected disclosures, as defined under 10 C.F.R. § 708.5(a). Id. ¶ 2. These disclosures included an expression of concern to a Congressman and DOE Assistant Secretary, as well as several "Work

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[1]Under Local Civil Rule 56.1, the party moving for summary judgment must attach to its motion a statement of undisputed material facts and the parties opposing the motion must respond with a statement of disputed material facts. In this case, all parties have filed a motion for summary judgment. Therefore, the Court has received statements of material facts from each party, as well as appropriate responses to those statements. This Factual Background section reflects the uncontested facts drawn from the parties' submissions.

Stop Problem Reports." Id. During the investigation following Gossett's complaint, the ROI concluded that Gossett made at least two protected disclosures, as defined under 10 C.F.R. § 708.5. Id. ¶ 3. These were a November 15, 2000, Condition Report and meeting with SECC officials concerning bulging and leaking drums and an October 19, 2000, presentation to DOE officials in Washington, DC, during which she discussed health and safety violations. Id. SECC does not contest the finding of protected disclosures. See Pet.'s Response to Resp. U.S. DOE's Statement of Material Facts Not in Dispute.

To ensure that RCTs possess the appropriate training and skill to perform their safety functions, DOE's RCT handbook requires a two-year cycle of continuing training, which includes a re-qualification examination at the conclusion of the retraining period. Resp. DOE's Statement ¶5. The re-qualification exam required by DOE consists of 100 questions, and DOE guidelines require RCTs to score an 80 to pass the exam. Id. ¶ 5.

Gossett took her first re-qualification exam on December 22, 2000. Id. ¶ 8. She failed the exam, scoring a 74. Id. On January 8, 2001, Gossett again took and failed the re-qualification exam, scoring a 73. Id. ¶ 9. Finally, on January 19, 2001, Gossett took her third re-qualification exam. Resp. DOE's Statement ¶ 7. Again Gossett failed, scoring a 74 out of 100. Id. Within hours of failing her third exam, Gossett's employment with SECC was terminated. Id. ¶ 8.

C. Procedural Background

On January 23, 2001, Gossett filed a complaint under DOE's Whistleblower Protection regulations with the DOE Oak Ridge Operations Office. Administrative Record ("R.") 7214. The complaint alleged that SECC used Gossett's failure to pass three re-qualification exams as a pretext for terminating her in retaliation for engaging in "whistleblowing activities," i.e., the

making of disclosures protected by 10 C.F.R. § 708.5. R. 7215-16.

Gossett requested that her complaint be referred to DOE's OHA for investigation and hearing. R. 7214. After the issuance of a ROI, Gossett requested and received a hearing on her complaint that was conducted from October 23-25, 2001. R. 7215. The Hearing Officer received evidence from Gossett and SECC, as well as post-hearing briefing from each party. Id. On May 8, 2002, the Hearing Officer issued an IAD. R. 7213-7232.

The IAD found that Gossett made numerous protected disclosures and that these disclosures were a contributing factor in her termination from SECC. R. 7217. The Hearing Officer noted that the close temporal proximity between Gossett's protected disclosures and her termination, coupled with a pattern of hostility from SECC towards Gossett, was sufficient to show that the protected disclosures were a contributing factor to Gossett's termination. Id. The Hearing Officer also found that SECC failed to meet its burden of showing by clear and convincing evidence that it would have terminated Gossett in the absence of her protected disclosures. R. 7219-28. In particular, because Gossett was the first employee fired under the "three-strike" policy, which required the termination of an RCT who failed a re-qualification exam three times, the Hearing Officer was not convinced that this policy was in place prior to Gossett's termination. Id.

SECC appealed the Hearing Officer's decision to the OHA Director, raising many of the same issues SECC now presents to this Court. R. 7193. OHA affirmed the IAD. R. 7200. In particular, OHA found that the temporal proximity between the protected disclosures and Gossett's termination was sufficient for the inference that the disclosures were a contributing factor to her termination. R. 7195. OHA also upheld the IAD's finding that SECC did not

establish by clear and convincing evidence that Gossett would have been terminated in the absence of her protected disclosures. R.7196-99.

The exact nature and importance of the decision by OHA is hotly contested between the parties, and this issue is highly relevant to this Court's review. The dispute over the OHA decision centers on the finding that Gossett satisfied her preponderance of the evidence burden. SECC argues that OHA found that Gossett met her burden by the use of the temporal proximity inference alone, and in doing so disregarded, as this Court should also, the IAD's finding of a pattern of hostility towards Gossett. Respondents counter that because OHA did not explicitly reject the pattern of hostility finding in the IAD, this Court should also consider IAD's finding of a pattern of hostility when evaluating SECC's challenges to the OHA decision.

Both parties concede that the OHA Director's decision is the final agency action that vests this Court with authority for judicial review, absent an appeal within 30 days to the Secretary. 10 C.F.R. § 708.34(d) ("The appeal decision issued by the OHA Director is the final agency decision unless a party files a petition for Secretarial review by the 30th day after receiving the appeal decision."). As such, this Court must treat the OHA decision as the final agency action for review, and will review only those findings and conclusions contained therein. See 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action ... is entitled to judicial review ").

In determining the findings of OHA, we turn to the text of the decision itself. Addressing whether Gossett met her burden of showing a contributing factor, OHA stated that "[o]nce the temporal proximity showing has been made, the finding of the pattern of hostility is not necessary to the overall conclusion that the complainant has made the contributing factor showing. The

conclusions in the IAD regarding the pattern of hostility are dictum in this case." [emphasis added]. R. 7195. OHA went on to say that "[t]he temporal proximity of the termination and Gossett's protected activities is ample evidence to sustain Gossett's burden of proof of contributing factor under Section 708.29." R. 7195-96. From the text of the decision, then, it is clear that the final agency decision of OHA found that Gossett had met her burden of showing a contributing factor solely through the temporal proximity inference, and it is that finding that this Court must review.

STANDARD OF REVIEW

This case is before the Court on cross-motions for summary judgment. Summary judgment is appropriate when the pleadings and the evidence demonstrate that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In this case, however, as is true generally for judicial review of agency action, the Court's review is limited to the administrative record. See Camp v. Pitts, 411 U.S. 138, 142 (1973). Petitioner challenges a final agency action, under 5 U.S.C. § 702, which provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." In reviewing an agency action, this Court is governed by the "arbitrary and capricious" standard set out in the APA, 5 U.S.C. § 706(2)(A). This is a highly deferential standard of review, which presumes that agency action is valid. See, e.g., Kisser v. Cisneros, 14 F.3d 615, 618 (D.C. Cir. 1994). The "scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). The Court may reverse only if the

agency's decision is not supported by substantial evidence, or the agency made a clear error in judgment. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415-16 (1971). "The key to the arbitrary and capricious standard is its requirement of reasoned decision-making: we will uphold the [agency's] decision if, but only if, we can discern a reasoned path from the facts and considerations before the [agency] to the decision it reached." Neighborhood TV Co. v. FCC, 742 F.2d 629, 639 (D.C. Cir. 1984). Furthermore, courts must defer to an agency's interpretation of its own regulations unless it is plainly wrong. General Carbon Co. v. OSHRC, 860 F.2d 479, 483 (D.C. Cir. 1998).

ANALYSIS

The petitioner challenges OHA's decision that SECC terminated Gossett because of her protected disclosures. SECC raises three arguments for setting aside the OHA decision. First, SECC argues that the burden-shifting scheme utilized by DOE is improper as a matter of law under the APA. In support of this argument, SECC argues that the DOE whistleblower regulations should be governed by the APA formal adjudication procedures. Second, SECC argues that Gossett's use of the temporal proximity inference to meet her burden of proof is inconsistent with the DOE regulations. Third, SECC argues that the OHA findings were arbitrary, capricious and not supported by substantial evidence. The Court considers each SECC argument in turn and finds none compelling.

A. Burden-Shifting Scheme

SECC challenges DOE's burden-shifting scheme generally as a violation of Section 7(c) of the APA, 5 U.S.C. § 556(d). The respondents counter that the DOE whistleblower protection regulations are informal adjudications not governed by Section 7(c), which pertains only to formal

adjudications. As discussed above, the DOE regulations specify that an employee must establish by a preponderance of the evidence that her protected disclosure under 10 C.F.R. § 708.5 was a contributing factor to the adverse personnel action. See 10 C.F.R. § 708.29. Once the employee does so, the burden is shifted to the contractor to show by clear and convincing evidence that the adverse personnel action would have occurred in the absence of the protected disclosure. Id. Here, OHA found that Gossett satisfied her contributing factor requirement by establishing close temporal proximity between the protected disclosures and her termination.

In arguing that the burden-shifting scheme utilized by DOE is a violation of the APA, SECC makes two assertions -- first, that the procedure used by DOE in its whistleblower protection regulations is a formal adjudication under the APA, and second, that therefore the burden-shifting scheme used by DOE violates Section 7(c) of the APA, which states: "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." Petitioner cites OWCP v. Greenwich Collieries, 512 U.S. 267 (1994), which struck down the Department of Labor "true doubt rule" as a violation of the APA. Under that rule, if the evidence was evenly balanced the benefit claimant would win. See Greenwich Collieries, 512 U.S. at 269. The Supreme Court found the "true doubt rule" violated Section 7(c) of the APA. Id. at 280. According to SECC, both the actual shifting of the burden and the imposition of a higher standard of proof on the contractor -- clear and convincing as compared to preponderance -- violate Section 7(c) of the APA.

Respondents never reach SECC's Section 7(c) argument because they contend that Section 7(c) does not apply to the DOE regulations. Specifically, respondents contend that the procedures for a formal adjudication, provided in 5 U.S.C §§ 554, 556-57, do not apply to the whistleblower

protection regulations. The threshold question is thus whether a proceeding under the DOE whistleblower protection regulations is a formal adjudication under the APA. DOE has never applied the procedures found in 5 U.S.C §§ 554, 556-57 to their whistleblower protection regulations. SECC contends that the statutory authority for DOE's regulations mandates application of the APA, and alternatively, that Supreme Court precedent and principles of due process require DOE to conduct a formal adjudication in the whistleblower setting. This Court concludes that the APA formal adjudication procedures do not apply to proceedings under DOE's whistleblower protection regulations, and therefore that Section 7(c) of the APA does not apply.

According to 5 U.S.C. § 554(a), the trial proceedings for a formal adjudication, set out in 5 U.S.C. §§ 556-57, are required only when an "adjudication is required by statute to be determined on the record after opportunity for agency hearing." It is not entirely clear what is necessary to trigger the formal adjudication requirements of sections 556 and 57, but the prevailing view is that there must be some statutory language directing the agency to hold a hearing on the record. See American Trucking Ass'n v. United States, 344 U.S. 298, 319-29 (1953); Western Res., Inc. v. Surface Transp. Bd., 109 F.3d 782, 793 (D.C. Cir. 1997); Chemical Waste Mgmt., Inc. v. EPA, 873 F.2d 1477, 1482 (D.C. Cir. 1989). If an agency adjudication is not governed by the formal procedural requirements of sections 556-57, the only APA procedural requirements that apply are those in section 555, which does not include the Section 7(c) burden-shifting prohibition.

An examination of the authorizing statutes for 10 C.F.R. § 708 et seq. reveals that there is no express statutory mandate for DOE to conduct a hearing on the record sufficient to trigger the formal procedures of sections 556-57. DOE regulations were issued pursuant to broad statutory authority granted by the Atomic Energy Act of 1954 (42 U.S.C. § 2201), the Energy

Reorganization Act of 1974 (42 U.S.C. § 5814, 5815), and the Department of Energy Organization Act (42 U.S.C. §§ 7251, 7254, 7255, 7256). See 57 Fed. Reg. 7533, 7535 (March 3, 1992). There is nothing in the language of these statutes that directs DOE to hold hearings on the record for whistleblower retaliation claims. SECC also points to 42 U.S.C. § 2231, a provision of the Atomic Energy Act, which requires all agency action taken pursuant to Chapter 23 (Atomic Energy) to be governed by the APA. However, that statute merely states the broad principle that "[t]he provisions of subchapter II of chapter 5, and chapter 7, of Title 5 [the APA] shall apply to all agency action taken under this chapter." 42 U.S.C. § 2231. That is a far cry from mandating DOE to conduct a hearing on the record.

Therefore, although 42 U.S.C. § 2231 refers generally to the application of the APA to agency action, it is not the specific statutory language needed to trigger the formal adjudication requirements of 5 U.S.C. §§ 556-57. Furthermore, it is not so much that the APA applies at all to DOE's whistleblower protection regulations, but rather whether the formal adjudication requirements apply.[2] SECC has failed to direct the Court to statutory language that mandates that DOE whistleblower protection proceedings be conducted through a formal adjudication.

SECC's second argument for the application of the APA formal adjudication procedures is that because OHA imposed money damages, due process requires a formal adjudication. SECC contends that due process mandates a hearing prior to any deprivation. This argument is not persuasive. As stated above, the APA formal adjudication procedures are triggered when there is specific statutory language requiring a hearing on the record. Moreover, due process does not

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[2]SECC's claim is not that the APA applies to 10 C.F.R. § 708 proceedings, but rather that the APA formal adjudication requirements, including the burden-shifting provision of Section 7(c), apply to the DOE whistleblower protection regulations.

require the full panoply of formal trial proceedings; rather, the Mathews v. Eldridge, 424 U.S. 319, 335 (1976), test only mandates that some process be given tantamount to the interests at stake. The whistleblower protection regulations provide sufficient procedural protections, listed in 10 C.F.R. § 708.28, to comport with any constitutional requirements. Therefore, due process does not provide a basis to mandate the application of the full formal adjudication procedures of the APA in this setting.

SECC's reliance on Wong Yang Sung v. McGrath, 339 U.S. 33 (1950), to argue that any due process interest in agency proceedings triggers full formal adjudication process is misplaced. Subsequent decisions leave no doubt that the APA formal adjudication process is only triggered by a specific statutory requirement. See, e.g., PBGC v. LTV Corp., 496 U.S. 633, 653-55 (1990); Chemical Waste Mgmt., 873 F.2d at 1482. Likewise, Greenwich Collieries is of little aid to SECC because there the Supreme Court concluded that Section 7(c) applied to the adjudications involved, which were formal adjudications under the governing statute, whereas here there is not the requisite statutory language to trigger full formal adjudication, and the proceedings thus remain informal adjudications.

For these reasons, the APA procedures for formal adjudication do not apply to the DOE whistleblower protection regulations. As a result, SECC's argument that the DOE regulations violate Section 7(c) of the APA need not be reached. The burden-shifting regime incorporated by DOE in 10 C.F.R. § 708.29 does not violate the APA.

B. Temporal Proximity Inference

SECC also challenges the temporal proximity inference used by Gossett to meet her burden. Specifically, SECC argues that the decision by OHA that temporal proximity alone is

sufficient to show that a protected disclosure was a contributing factor under 10 C.F.R. § 708.29, without also establishing a retaliatory motive, is inconsistent with the language of § 708.29 and undermines the goals of the DOE regulations. Respondents counter that DOE's interpretation of its own regulations is owed deference, and that the use of a temporal proximity presumption is consistent with other statutory and regulatory whistleblower schemes.

The Supreme Court has stated that the job of the courts "is not to decide which among several competing interpretations best serves the regulatory purpose. Rather, the agency's interpretation must be given 'controlling weight unless it is plainly erroneous or inconsistent with the regulation.'" Thomas Jefferson Univ. v. Shalala, 512 U.S. 504, 512 (1994) (quoting Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 414 (1945)); see also United States v. Mead Corp., 533 U.S. 218, 227 (2001) (an agency's interpretation of its own regulation is entitled to substantial deference). Since originally promulgating the section 708 regulations, DOE has consistently permitted an employee to meet the contributing factor burden through evidence that the adverse personnel action taken against the employee occurred in close temporal proximity to the employee's protected disclosures. See Ronald A. Sorri v. Sandia Nat. Lab., LWA-0001 (June 9, 1993); Janet Westbrook, 28 DOE ¶ 87,021, Case No. VBA-0089 (2002) (holding that if the employee can show a close temporal proximity between the protected disclosures and adverse personnel action, along with actual or constructive knowledge by the employer of the disclosures, the employee can satisfy the contributing factor burden).[3] That reasonable interpretation is

[3]In its opinion in this case, OHA appears to indicate that temporal proximity, even without the terminating officials's knowledge of the employee's protected activity, is sufficient to establish a contributing factor. See R. 7195. That would be inconsistent with both DOE's past application of the temporal proximity inference and the DOE regulations themselves. Here, the terminating official's knowledge was never the issue, but if it were, then an employee would need

entitled to deference from this Court because it is not inconsistent with the language of section 708.29 or otherwise plainly wrong.

SECC argues that the temporal proximity presumption undermines the retaliatory motive concept imbedded in the regulations and undermines the regulatory goal of ensuring the safety of DOE facilities. However, this argument fails sufficiently to appreciate the purpose of the temporal proximity presumption, as well as its widespread use in other statutory and regulatory whistleblower protection schemes. The presumption is used to infer retaliation on the part of the employer. R. 7196. This is consistent with the goal of the regulations, which is to promote the safety of DOE facilities by encouraging and protecting whistleblowers. See 64 Fed. Reg. 12862 (March 15, 1999).

Moreover, the temporal proximity presumption is consistent with both the Whistleblower Protection Act of 1989, 5 U.S.C. § 1221(e)(1) ("WPA"), and Department of Labor ("DOL") regulations, 29 C.F.R. § 24.5(b)(3), authorized by the Energy Reorganization Act of 1974, 42 U.S.C. § 585. In the both the WPA statute and the DOL regulations, a temporal proximity presumption is explicitly mentioned as a method by which an employee can satisfy the burden of establishing that a disclosure was a contributing factor in the adverse personnel action. See 5 U.S.C. § 1221(e)(1); 29 C.F.R. § 24.5(b)(3). Although the details of the WPA, the DOL regulations and the DOE whistleblower protection regulations vary, they all share the same goal -- to ensure that employees and government officials are protected against retaliation as a result of "whistleblowing activities." Given the deference this Court must show to an agency's reasonable interpretation of its own regulations, as well as the legitimate justification for a temporal

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to show both temporal proximity and knowledge to satisfy the regulatory burden.

proximity inference, also reflected in the WPA and in the DOL regulations, DOE's use of the temporal proximity presumption is not inconsistent with the language or purpose of 10 C.F.R. § 708.29.

C. OHA's Findings Are Supported by Substantial Evidence

Finally, SECC raises two challenges to the findings in the OHA decision. SECC argues that the findings (1) that Gossett satisfied her burden of establishing by a preponderance of the evidence that her protected disclosures were a contributing factor to her termination, and (2) that SECC failed to meet its burden to show by clear and convincing evidence that Gossett would have been terminated absent the disclosures should both be overturned as arbitrary and capricious and not supported by substantial evidence.

As stated above, the legal standard for judicial review of an agency action is deferential. A final agency decision will be set aside only if it is arbitrary, capricious or not supported by substantial evidence. 5 U.S.C. § 706. An agency decision is arbitrary and capricious if the agency fails to articulate a rational connection between the facts found and the decision made. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43; Bowman Transp. v. Arkansas-Best Freight Sys., 419 U.S. 281, 285 (1974). This Court will not substitute its judgment for that of the agency so long as a rational basis for the decision has been provided. See Sloan v. Dep't of Housing and Urban Dev., 231 F.3d 10, 15 (D.C. Cir. 2000). This standard of review applies to both of the challenged OHA findings.

i. Finding that Gossett Satisfied Contributing Factor Burden

SECC first argues that Gossett failed to meet her burden of showing by a preponderance of the evidence that her disclosures were a contributing factor in her termination. On this issue,

SECC argues that the finding of a pattern of hostility in the IAD was not supported by evidence in the record. However, the OHA decision on this issue rested solely on the close temporal proximity between Gossett's protected disclosures and termination. The finding in the IAD of a pattern of hostility was not relied upon by OHA and hence is not part of this Court's review of the OHA decision regarding whether Gossett satisfied her "contributing factor" burden.

Examining OHA's finding of temporal proximity, it is uncontested that Gossett made two protected disclosures in October and November of 2000. See Resp. DOE's Statement ¶ 3. Furthermore, it is uncontested that Gossett was terminated in January 2001. OHA found that the roughly two month period between Gossett's last disclosure and her termination was sufficiently narrow to permit the application of the temporal proximity presumption. Although a period of years would strain credibility, two months is sufficiently close to permit a rational inference that the disclosures were a contributing factor in the termination. SECC presented no evidence in the record to challenge OHA's finding that two months was sufficiently close in time to support the temporal proximity inference. Therefore, this Court finds that OHA's decision that Gossett met her burden of showing that the protected disclosures were a contributing factor in her termination was not arbitrary or capricious and, moreover, was supported by evidence in the record.

ii. Finding that SECC Failed to Meet Its Burden

SECC's final challenge is that OHA incorrectly found that SECC failed to meet its burden to show by clear and convincing evidence that it would have terminated Gossett even in the absence of her disclosures. Respondents, not surprisingly, dispute this assertion, and argue that OHA's decision is supported by substantial evidence. OHA found that SECC failed to establish that its "three-strike" policy, which required an RCT to be terminated for failing three re-

qualification exams, was in existence at the time of Gossett's termination or was consistently applied. R. 7197-7199.

OHA's decision focused on the following factual determinations: (1) SECC did not have a written policy pertaining to the "three strike" rule; (2) SECC failed to present any direct evidence that RCTs were aware of the existence of the three-strike rule; and (3) SECC had never previously terminated a RCT for failing the re-qualification exam three times. See R. 7197-99. None of these factual determinations made by OHA is really challenged by SECC. See Pet. Response to Resp.'s Statements at 1, 5.

Furthermore, the hearing officer was able to hear the testimony of the SECC officials who testified to the existence of the three-strike policy. The hearing officer made certain credibility assessments with respect to these witnesses and found that their statements reflected inconsistencies as to the application and existence of the three-strike policy. R. 7221-7225. On this basis, the IAD found, and OHA agreed on appeal, that SECC failed to establish that the three-strike policy was in effect at the time of Gossett's termination. As a result, OHA concluded that SECC failed to establish by clear and convincing evidence that it would have terminated Gossett in the absence of her disclosures.

Again, this analysis is governed by the deferential arbitrary and capricious standard, and the question for this Court is whether OHA's decision is rational and supported by substantial evidence. Although it is not certain that the IAD and OHA made the correct judgment on this question, under the guidance set forth through the arbitrary and capricious standard, this Court is not to substitute its own judgment for that of the agency decisionmakers. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43. Rather, this Court must assess whether the agency has made a

"rational connection" between the facts and its decision. See Neighborhood TV Co., 742 F.2d at 639. Therefore, applying this deferential standard, there is sufficient evidence in the record to support the decision by OHA. In particular, OHA made several factual findings, cited above, which are uncontested by SECC. The evidence in the record certainly shows a rational connection between OHA's conclusion that SECC did not establish the existence of the three-strike policy at the time of Gossett's termination and the facts highlighted by OHA. Therefore, this Court will not overturn the decision of OHA that SECC failed to meet its burden.

CONCLUSION

For the reasons stated above, this Court finds that OHA's decision that Gossett's termination from SECC was at least in part due to retaliation for her whistleblowing activities was consistent with the APA and its own regulations, and was supported by substantial evidence in the record. The Court will therefore grant respondents' motion for summary judgment and deny petitioner's corresponding motion. A separate order will be issued with this memorandum opinion.

/s/ John D. Bates
JOHN D. BATES
United States District Judge

Dated: October 15, 2004

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